

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOUIS MICKENS-THOMAS,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	NO. 99-6161
	:	
DONALD VAUGHN, <i>et al.</i> ,	:	
Respondents.	:	

MEMORANDUM

BUCKWALTER, J.

September 29, 2000

On December 6, 1999, Petitioner filed his application for habeas corpus under 28 U.S.C. § 2254 attacking the failure of Respondents to release him on parole after grant of commutation. By order of this court dated December 22, 1999, the case was referred to United States Magistrate Judge Thomas J. Rueter for a Report and Recommendation.

All Respondents filed a motion to dismiss, the Attorney General's motion being unopposed. Respondents Vaughn, Pennsylvania Board of Probation and Parole and the Pennsylvania Board of Pardons requested dismissal on two grounds:

- (1) Failure to exhaust; and
- (2) On the merits as to both the *ex post facto* and due process issues.

After receiving briefs from each side, Magistrate Judge Rueter filed his Report and Recommendation on August 21, 2000, in which he concluded that the Petition should be denied for failure to exhaust and on the merits. On September 6, 2000, Petitioner filed his

objections to both conclusions, and on September 22, 2000, Respondents filed their memorandum in opposition to Petitioner's objections.

I agree that under the circumstances of this case, Petitioner has exhausted his state remedies. Decisions in this court have held that habeas corpus petitioners who challenge actions of respondents are required to exhaust by filing a mandamus action in the Pennsylvania Commonwealth Court before filing a federal habeas. Petitioner in this case has not done so. Instead, based upon a reasonable interpretation of the Third Circuit decision in Burkett v. Love, 89 F.3d 135 (3d Cir. 1996), he filed an original habeas corpus petition with the Supreme Court of Pennsylvania. The per curiam order of that court dated December 8, 1998 said "the request for leave to file is granted and the petition for writ of habeas corpus is denied." This court in Carter v. Muller, 45 F.Supp. 2d 453 (E.D. Pa. 1999) explained in detail why filing a petition before the Supreme Court of Pennsylvania is no longer appropriate for purposes of exhaustion. I agree, but find it is not applicable to the procedural history of this case.

As to Petitioner's objection to the finding on the merits, I agree that he has plead enough facts that when viewed as true for purposes of this motion preclude dismissal.

Two final considerations remain. First, Magistrate Judge Rueter has done an outstanding job in framing the issues on the merits and in setting forth much of the applicable law. I do not think that it is necessary for him to do any more with regard to this case. In the interest of moving toward disposition at this level, I will vacate the order of reference.

Second, there remains for disposition Petitioner's motion for discovery. I will deny that without prejudice to the court's determining after a conference among the parties what

discovery is appropriate. Petitioner's present motion is simply too broad. At the discovery conference, I expect Petitioner to narrow on just what he needs and why.

An order follows.

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ORDER

AND NOW, this 29th day of September, 2000, upon consideration of the Report and Recommendation filed August 21, 2000, and Petitioner's objections thereto, the Court finds that:

- (1) Petitioner has exhausted his state remedies;
- (2) The Motion of Attorney General Fisher to Dismiss (Docket No. 4) is

GRANTED;

- (3) The Motion of Respondents Superintendent Donald Vaughn, the Pennsylvania Board of Probation and Parole, and the Pennsylvania Board of Pardons (Docket No. 5) is DENIED;

- (4) The motion for discovery (Docket No. 1) is DENIED without prejudice;

- (5) A discovery conference will be scheduled by the Court. Three (3) days prior to that conference, the parties will submit a discovery memorandum setting forth:

- (a) Stipulations they have reached, if any, regarding discovery;

(b) To the extent stipulations cannot be reached, Petitioner is to set forth in his discovery memorandum with specificity what discovery he needs, together with particularity, the reasons it is relevant to the theory of his case;

(c) Respondents should in their discovery memorandum state its objections and reasons for them. Petitioner's discovery memorandum should be submitted to Respondent (10) days before the scheduled conference; and

(d) The order of reference dated December 22, 1999 (Docket No. 2) is VACATED.

BY THE COURT:

RONALD L. BUCKWALTER, J.